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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

(SAN JOSE DIVISION)

ACACIA MEDIA TECHNOLOGIES CORPORATION,

Plaintiff,

v.

NEW DESTINY INTERNET GROUP, et al.,

Defendants.

AND ALL RELATED AND/OR CONSOLIDATED CASE ACTIONS

Case No. C 05-01114 JW (HRL)

POST-HEARING REPLY BRIEF RE: ACACIA'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF THE JULY 12, 2004 *MARKMAN* ORDER

Dockets.Justia.com

Prior to the September 8-9 hearing in this matter, the parties submitted a Joint Claim Construction and Prehearing Statement. [Docket No. 76.] As counsel for the New Destiny defendants advised the Court during the September hearing, through miscommunications among counsel, that statement did not accurately reflect the position of the New Destiny defendants as to the correct construction of the "in data communication with" limitation. The New Destiny defendants' position as to this limitation was accurately reflected in the original version of that pleading circulated by Acacia's counsel, Mr. Block, on August 24, 2005. [*See* Miller Decl., Ex. A.] Mr. Miller gave Mr. Block consent to sign that pleading on his behalf.

At the September hearing, Mr. Block advised Mr. Miller of the change to the document.[1] In further discussions, it appeared that compromise regarding the disputed construction could potentially be reached. This possibility was conveyed to the Court. Counsel for the New Destiny defendants proposed that rather than presenting argument, the parties would attempt to reach informal resolution, and if such efforts proved unsuccessful the matter would be addressed in reply briefing.

Apparently, Acacia subsequently came to the view that informal resolution was not possible. [*See* Miller Decl. Ex. B ("About 'in data communication with,' I've looked at your arguments in your opposition and it does not appear from our point of view that there is any room for discussing a different construction than that proposed by Acacia and agreed to by all of the other defendants. We certainly will not agree to modify the construction to add the limitation of 'continuously connected,' as you propose. Accordingly, we will be opposing your arguments in our reply brief.")]

The New Destiny defendants' position regarding the construction of the "in data communication with" limitation is presented in their opposition brief. [Docket No. 68]. That position remains unchanged. Should the Court determine that its previous construction of this limitation should be reconsidered, the New Destiny defendants request that oral argument be

[1] Mr. Block made clear that he had not initiated the change to the pleading and that he questioned the change in view of the opposition brief filed by the New Destiny defendants, but was assured by counsel for another defendant in this matter that Mr. Miller had consented to the change. Mr. Block's representations are not contested.

allowed. Defendants suggests that in view the number of parties such argument be presented in a brief telephonic hearing or at the commencement of the next phase of the *Markman* proceedings in this matter.

Dated: September 28, 2005

FISH & RICHARDSON P.C.

By: /s/

Todd G. Miller
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